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CPLR 3213: Court Suggests That Error in Computation of Motion Date Can Be Remedied Through Exercise of Its Discretion

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militate against the extension sought by the plaintiff; all arise because the respective liabilities and alleged negligence of the individual wrongdoer have not been proven. First, the policy limits of the co-defendants may differ, and the payment of any judgment may be impossible if one or both of the policy limits have been exceeded. Secondly, the issue of the defendant's liability *inter se*, even though the carrier will ultimately pay the judgment, affects, if nothing else, the co-defendants' respective future liability insurance rates and the availability of future insurance coverage. Finally, the co-defendants should be granted the opportunity to protect themselves against the imposition of a judgment even if the insurance carrier pays the same. Since the latter two considerations are neither moot nor hypothetical, there seems to be no good reason to fail to adjudicate respective liabilities in favor of mere acceleration, although the *Kopperman* court suggests that such a procedure for "innocent plaintiffs" should be adopted by the legislature.

Kopperman thus appears to stand for the proposition that the judiciary is not about to give *carte blanche* application to any "real party in interest" theory, and will limit it to the truly worthy plaintiff, contemplated in *Dobkin*, who is otherwise remediless.

CPLR 3213: Court suggests that error in computation of motion date can be remedied through exercise of its discretion.

One of the problems confronting an attorney desiring to utilize the special procedure afforded by CPLR 3213 arises because he is compelled to set the hearing date in advance of actual knowledge of the time that the summons and motion for summary judgment in lieu of a complaint are to be served on the defendant.[93] This requirement represents a potential conflict within CPLR 3213 in that the section has a built-in time sequence which dictates that there be a specified limit of time between the service of the summons and notice of motion and the motion return date.

CPLR 320(a), incorporated by reference into CPLR 3213, prescribes the minimum time after service before which the motion can be heard, and, under this rule, if service is made by personal delivery of the summons to the defendant in New York, he has twenty days within which he must answer; if the summons is served by any other

93 *See* CPLR APPENDIX OF OFFICIAL FORMS, Form 29, at 57 (Bender Pamphlet ed. 1968). The notice of motion must specifically set forth the time that the motion is to be heard.

means, he has thirty days after service is completed within which to answer.[94]

In terms of motion practice, this is the minimum period which the plaintiff's attorney must allow defendant to answer before defendant can be in default.[95] If, for example, plaintiff's attorney allows two days for service of the papers, and sets the motion date for the twenty-second day after issuance of the papers (assuming personal service within the state), and the papers are not served until the third day, then plaintiff has not given defendant the requisite twenty days within which he may answer. The defendant, therefore, can not be in default on the motion date, which is the nineteenth day after service of the papers.

In the case of personal service within the state, because CPLR 3213 requires that the return date must be within ten days after the twentieth day following service, this apparent problem cannot always be overcome by the mere expedient of adding extra days to the time for the return. This ten day limitation is the maximum amount of time during which plaintiff is entitled to have defendant's answering papers for study.[96]

Therefore, as there are precise time periods after service which determine jurisdiction over the defendant, it is apparent that accurate estimates of the date of service can be critical; and it is equally apparent that a good number of plaintiffs' attorneys are not going to be able to make that estimate accurately.

In *Flushing National Bank v. Brightside Manufacturing Inc.*,[97] the defendants attacked service of the summons and notice of motion on the grounds that they were not given the requisite twenty days to answer. The court, in granting plaintiff's motion for summary judgment, called the effect of plaintiff's error in selecting a return date a "hypertechnical barrier." Accordingly, the court suggested that the small error in the computation of the date of service could be remedied through the "exercise [of] discretion by giving defendants sufficient time to answer the moving papers, while retaining jurisdiction."[98] In

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94 *See* 7B MCKINNEY'S CPLR 320, commentary 577 (1963).

95 *See, e.g.*, Knudson v. Flynn-Hill, Knudson Elevator Corp., 49 Misc. 2d 78, 266 N.Y.S.2d 897 (Sup. Ct. Queens County 1966). *See also* 7B MCKINNEY'S CPLR 3213, supp. commentary 284-86 (1966).

96 For a complete discussion of these time limitations see 7B MCKINNEY'S CPLR 3213, supp. commentary 286-88 (1965). *See also* 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE, amendment, at 32-140 (1968).

97 59 Misc. 2d 108, 298 N.Y.S.2d 197 (Sup. Ct. Queens County 1969).

98 *Id.* at 110, 298 N.Y.S.2d at 199.

so holding, the court cites Professor Siegel's practice commentary wherein this procedure is recommended.[99]

Although this court's adoption of Professor Siegel's suggested procedure is merely dictum,[100] if this suggestion is followed it will, in effect, amount to a short adjournment by the court to allow the defendant his statutorily guaranteed twenty day notice. However, the adjournment has the advantage of permitting the court to retain personal jurisdiction over the parties.

Retention of personal jurisdiction can become exceedingly acute when there is also a statute of limitations problem or a possible problem in regaining personal jurisdiction over the defendant. For example, where the statute of limitations has tolled during the period between the service of the summons and the return date of the motion, a concededly remote possibility, the plaintiff's attorney might be guilty of malpractice through no real fault of his own. The other possible injustice which might otherwise arise is where the personal jurisdiction of the defendant is permanently lost to the plaintiff upon dismissal of the action. In all other cases the plaintiff can begin his suit anew by serving another summons and motion for summary judgment under CPLR 3213 and hoping for a more fortuitous service.

The result suggested in both the instant case and by Professor Siegel would further the legislative intent underlying the enactment of 3213 and should be adopted to alleviate the two problems discussed. In this manner, defendant gets the twenty days to answer to which he is entitled, and plaintiff is not out of court merely because the process server he used was unable to serve the papers on the exact date contemplated.

CPLR 3213: Separation agreement held not to be an instrument for the payment of money only.

A motion for summary judgment in lieu of a complaint is warranted under CPLR 3213 when an action is presumptively meritorious, *i.e.*, when it "is based upon an instrument for the payment of money only or upon any judgment. . . ."

The predecessors of the CPLR did not offer a plaintiff similar summary relief. Therefore, little New York statutory or case law precedent existed to aid in the section's interpretation after its enact-

[99] 7B McKINNEY'S CPLR 3213, supp. commentary 286-88 (1965).

[100] The court found that defendants had waived the right to object to the lack of the twenty-day notice of motion because they served answering affidavits and elected to contest on the merits.